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Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County, et al: A Death Knell for Nationwide Class Actions?

Annie McClellan
mcclelae@mail.uc.edu

BRISTOL-MYERS SQUIBB CO. V. SUPERIOR COURT OF CALIFORNIA, SAN FRANCISCO COUNTY, ET AL: A DEATH KNELL FOR NATIONWIDE CLASS ACTIONS?

*Annie McClellan**

I. INTRODUCTION

Class action lawsuits trace back to thirteenth century England, which permitted "group litigation" for the efficiency of hearing cases during a time when travel was difficult.[1] Although the concept died in England, the notion of congregating claims was introduced to American courts in the 1800s and has since become a tenet of modern-day litigation.[2] Eventually this group litigation rule was codified as Federal Rule of Civil Procedure 23 in 1938.[3] The rule has undergone numerous changes over the years.[4] The Supreme Court's 2017 decision, *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County, et al.*, a case that does not actually directly discuss class actions, arguably has had the most recent significant impact on the success of certifying classes.

This Comment addresses whether *Bristol-Myers Squibb* in effect forbids the use of nationwide class actions.[5] Section II provides a background of personal jurisdiction, class actions, *Bristol-Myers Squibb*, and several district court decisions that *Bristol-Myers Squibb* has recently influenced. Section III closely examines the language of *Bristol-Myers Squibb* and predicts how that language will likely affect lower court rulings in subsequent years. Section III also analyzes the impact of *Bristol-Myers Squibb* on district court personal jurisdiction class action decisions by reexamining the district court decisions outlined in Section II. Finally, Section III argues that specifically Federal Rule of Civil Procedure 23(b)(3) class actions are the type of class action to be most affected by this latest Supreme Court ruling.

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1. "History of Class Action Lawsuits," CLASS ACTION LAWSUITS CENTER (2018), https://classactionlawsuitcenter.com/history-of-class-action-lawsuits/ (last visited Apr. 14, 2018).

2. *Id.*

3. *Id.*

4. *Id.*

5. Nationwide class actions are those in which all or some members in the plaintiff class are not from or injured in the forum state.

II. BACKGROUND

Class actions are closely tied to personal jurisdiction issues because such lawsuits frequently involve plaintiffs living in and injured in numerous states throughout the country. Part (a) discusses personal jurisdiction and the two types of personal jurisdiction the Supreme Court recognizes. Part (b) notes the present state of federal law regarding class actions. Part (c) addresses the Supreme Court's recent personal jurisdiction decision from the 2016-2017 term—*Bristol-Myers Squibb*—released in June of 2017, and Part (d) examines some of the subsequent federal district courts' decisions on personal jurisdiction affecting class actions since the Supreme Court's June decision.[6]

a. Personal Jurisdiction

A court has authority to adjudicate an individual's rights when it has personal, or territorial, jurisdiction over the people or property in the action.[7] Personal jurisdiction is limited by the Due Process Clause of the Fourteenth Amendment, which states that "no state shall . . . deprive any person of life, liberty, or property, without due process of the law."[8] "Property" in this clause can refer to a legal claim or cause of action,[9] and this protection applies to both plaintiffs and defendants.[10] While a plaintiff's choice of forum is generally favored, if the plaintiff chooses a forum outside of its home, less deference is given.[11]

State legislatures determine the amount of authority state courts have over nonresident defendants.[12] All states now have long-arm statutes to provide their state courts with personal jurisdiction over nonresident defendants who cannot be served in the forum state.[13] There are two types of long arm statutes.[14] One is a laundry list approach that specifies factual

6. These cases were chosen based on how directly the courts discuss *Bristol-Myers Squibb* in advocating for their stances. At the time this Article was written, several months after the Supreme Court's *Bristol-Myers Squibb*'s ruling, there were a limited quantity of cases to choose from at the district court level and none had any appellate decisions yet.

7. JACK H. FRIEDENTHAL, ET AL., CIVIL PROCEDURE 99 (4th ed. 2005).

8. U.S. Const. amend. XIV.

9. *See* Jeremy A. Blumenthal, *Legal Claims as Private Property: Implications for Eminent Domain*, 36:3 HASTINGS CONSTITUTIONAL LAW QUARTERLY 373, 373 (2009).

10. *See, e.g.*, The Law Office of Stephen O'Rear, P.C., *Assignment of Causes of Action in Texas*, FORT WORTH INJURY LAWYER BLOG (June 25, 2013), https://www.fortworthinjurylawyer-blog.com/2013/06/assignment-of-causes-of-action-in-texas.html (referring to a defendant's ability to assign a cause of action against an insurance company to the plaintiff).

11. Piper Aircraft v. Reyno, 454 U.S. 235, 265-66 (1981).

12. RICHARD L. MARCUS, ET AL., CIVIL PROCEDURE: A MODERN APPROACH 737 (7th ed. 2018).

13. *Id.*

14. *Id.*

circumstances where due process requirements would likely be satisfied.[15] Such statutes then require a separate analysis to ensure whether personal jurisdiction over the defendant comports with the Constitution.[16] The other type of long arm statute employs a blanket approach, which permits all jurisdiction permitted by state and federal constitutional law.[17]

There are two types of personal jurisdiction: general jurisdiction and specific, which are described respectively.[18]

i. General Jurisdiction

General jurisdiction is, in essence, "all-purpose" jurisdiction.[19] General jurisdiction is established if an "individual's domicile" is within the given forum.[20] For corporations, general jurisdiction is established by an "equivalent place" to an individual's domicile—"one in which the corporation is fairly regarded as at home."[21] When general jurisdiction exists, a court can hear a greater variety of claims by a plaintiff, even if the events giving rise to the claim occurred in a different state.[22] Continuous and systematic contacts with the forum state may be sufficient to establish general jurisdiction, especially where the defendant purposefully availed itself of the forum state's laws.[23] After the Supreme Court's decisions in *Goodyear Dunlop Tires Operations, S.A. v. Brown* and *Daimler AG v. Bauman*, in 2011 and 2014 respectively, the place of incorporation and the principal place of business are the main components utilized by courts to establish general jurisdiction over corporations today.[24]

If the easier general jurisdiction is not found, courts transition to a more fact-intensive specific jurisdiction analysis.[25]

15. *Id.*
16. *Id.*
17. *Id.*
18. Daimler AG v. Bauman, 134 S.Ct. 746, 754 (2014).
19. *Id.* at 758.
20. Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 924 (2011).
21. *Id.*
22. *Id.* at 919.
23. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 482 (1985).
24. 564 U.S. 915, 918 (2011); 134 S.Ct. 746, 760 (2014).
25. Andrew D. Bradt and D. Theodore Rave, *Aggregation on Defendants' Terms: Bristol-Myers Squibb and the Federalization of Mass-Tort Litigation*, 59 BOSTON COLLEGE LAW REVIEW 1251, 1271 (2018).

ii. Specific Jurisdiction

Specific jurisdiction is, in essence, "case-linked" jurisdiction.[26] Specific jurisdiction requires a lawsuit to "aris[e] out of or relat[e] to the defendant's contacts with the forum."[27] There must be an "affiliatio[n] between the forum and the underlying controversy"; some sort of relevant situation must occur in that state.[28] The defendant, if not present in the state, must have minimum contacts with the forum such that the exercise of personal jurisdiction does not offend traditional notions of fair play and substantial justice.[29] Moreover, the defendant must have purposefully availed itself to the privileges of conducting activities within the forum state, thus invoking the benefits and protections of the state's law such that it is foreseeable the defendant would be haled into court there.[30]

The requirement of minimum contacts was established in *International Shoe Co. v. Washington*.[31] There, orders for shoes were processed and shipped from out of state.[32] However, the "contacts" to the state in this case were $31,000 in commissions, a dozen salesmen, shoe displays, rented sample rooms, rented exhibit buildings, and rented hotel rooms.[33] These contacts were enough to avoid violations of traditional notions of fair play and substantial justice when the state exercised personal jurisdiction over the company.[34]

A series of decisions have addressed the concept of minimum contacts. For example, *McGee v. International Life Ins. Co.* articulated the least possible contacts necessary to still find specific jurisdiction.[35] In *McGee*, there was a mere life insurance policy connecting the defendant to that state, and that was deemed enough for the exercise of jurisdiction to comport with "fair play and substantial justice."[36]

World-Wide Volkswagen Corp. v. Woodson clarified the five factors identifying whether traditional notions of fair play and substantial justice are violated by a court exercising personal jurisdiction over a party.[37] The factors are (1) the burden on the defendant, (2) the forum state's interest

26. *Goodyear*, 564 U.S. at 919.

27. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414, n. 8 (1984).

28. *Goodyear*, 564 U.S. at 919.

29. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); McGee v. International Life Ins. Co., 355 U.S. 220, 222 (1957).

30. Hanson v. Denckla, 357 U.S. 235, 253 (1958).

31. 326 U.S. 310, 316 (1945).

32. *Id.* at 314.

33. *Id.* at 313-14.

34. *Id.* at 316, 321.

35. 355 U.S. 220, 223 (1957).

36. *Id.* at 221-23.

37. 444 U.S. 286, 292 (1980).

in adjudicating the dispute, enforcing laws, or providing redress for its citizens, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the interstate judicial system's interest in obtaining the most efficient resolution, and (5) the furtherance of fundamental substantive social policies.[38] In *World-Wide Volkswagen*, the plaintiff suffered a car accident in Oklahoma, but the car was purchased in New York by New York residents.[39] The Supreme Court found that there was no specific personal jurisdiction in Oklahoma just because the car accident happened to occur while the plaintiffs were passing through the state.[40] The Court coined the accident as an "isolated occurrence" that did not rise to a level of establishing specific jurisdiction.[41]

The due process analysis for personal jurisdiction requires more than minimum contacts and the fulfillment of traditional notions of fair play and substantial justice.[42] The quality and nature of the minimum contacts must be such that the defendant, through those contacts, "purposefully availed itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws."[43]

Justice Brennan ordered the analysis in *Burger King* in 1985 when he used a two-step inquiry.[44] First, the defendant must have "purposefully established 'minimum contacts' in the forum State."[45] If sufficient contacts are present, then jurisdiction is presumptively reasonable.[46] However, the presumption may be overcome in the second inquiry if it can be shown that jurisdiction would not comport with traditional notions of "fair play and substantial justice," as set out in *World-Wide Volkswagen*.[47]

This was the state of the law of specific personal jurisdiction prior to the Supreme Court's *Bristol-Myers Squibb* decision in June of 2017. Some argue that specific personal jurisdiction law has not changed in light of *Bristol-Myers Squibb*.[48] However, this Comment argues otherwise, especially for specific personal jurisdiction in class actions.

38. *Id.*

39. *Id.* at 295.

40. *Id.*

41. *Id.*

42. Hanson v. Denckla, 357 U.S. 235 (1958).

43. *Id.* at 253.

44. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985).

45. *Id.*

46. FRIEDENTHAL, *supra* note 7, at 154.

47. *Burger King*, 471 U.S. at 476.

48. *See, e.g.*, Casso's Wellness Store & Gym, L.L.C. v. Spectrum Lab. Prods., Inc., No. 17-2161, 2018 WL 1377608 (E.D. La. Mar. 19, 2018).

b. Class Actions

A court must have personal jurisdiction over all plaintiffs and all defendants in a lawsuit.[49] Thus, even before *Bristol-Myers Squibb*, personal jurisdiction was a tenuous issue with larger class actions, because there were many players involved.[50] Class actions, representative lawsuits in which several individuals sue on behalf of many class members similarly situated,[51] are governed by Federal Rule of Civil Procedure 23.[52] In order to certify a class action, all four prongs of Rule 23(a) must be satisfied, and one of the three prongs of 23(b) must be satisfied.[53]

The prerequisites of 23(a) are (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy.[54] Numerosity means that there are so many class members that mere joinder of parties is impracticable.[55] The presence of common issues of law or fact means that class members have suffered the same injury, such that there is a common contention "answerable in one fell swoop."[56] Typicality means that the claims or defenses of the representative parties are typical of the claims or defenses of the class.[57] Finally, representative parties must fairly and adequately protect the interests of a class when there is a shared interest between the representatives and other class members and there is an unlikelihood of collusion among class representatives.[58]

Rule 23(b) establishes several types of class actions.[59] Rule 23(b)(1)(A) class actions result when separate actions by individual parties would create a risk of inconsistent decisions, which would establish irreconcilable standards of conduct for the opposing party.[60] Rule 23(b)(1)(B) class actions are found when plaintiffs' individual abilities to win would be impeded or impaired if the lawsuits were all

49. *Personal Jurisdiction*, LEGAL INFORMATION INSTITUTE (2018), https://www.law.cornell.edu/wex/personal_jurisdiction (last visited Apr. 26, 2018) (referring to the exercise of power over a "party" in the case, not just the plaintiff or just the defendant).

50. *See* In re Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mexico, 910 F. Supp. 2d 891 (E.D. La. 2012), aff'd 739 F.3d 790 (5th Cir. 2014); In re Nat'l Football League Players' Concussion Injury Litig., 821 F.3d 410 (3d Cir. 2016).

51. MARCUS, *supra* note 12, at 308-11.

52. Fed. R. Civ. P. 23.

53. MARCUS, *supra* note 12, at 317-29.

54. Fed. R. Civ. P. 23(a)(1)-(4).

55. MARCUS, *supra* note 12, at 328-29.

56. Jeffrey E. Crane, *A New Battleground in Class Actions: The Commonality Requirement of 23(a)(2)*, INSURANCE AND REINSURANCE LAW REPORT 30, 31 (2012), https://www2.sidley.com/files/upload/2012_IRLR_NEW_BATTLEGROUND.pdf.

57. FRIEDENTHAL, *supra* note 7, at 762.

58. MARCUS, *supra* note 12, at 324-25.

59. Fed. R. Civ. P. 23(b).

60. Fed. R. Civ. P. 23(b)(1)(A).

separate.[61] Rule 23(b)(2) class actions exist when the opposing party's actions or lack of actions generally apply to the whole class, thus making injunctive or declaratory relief the most appropriate form of relief.[62] Finally, Rule 23(b)(3) authorizes the class action device when the court finds that the "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[63]

Rule 23 exemplifies the due process requirements of class actions.[64] A court must look past the pleadings for the certification decision.[65] A court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues.[66] That courts should not consider the merits on class certification has long been a tenet in class action procedure.[67] And although the recent Supreme Court decision, *Bristol-Myers Squibb*, did not deal explicitly with a class action on the facts, this personal jurisdiction case will surely have profound implications on class actions and will likely be a new "staple of first-year Civil Procedure courses everywhere."[68]

c. Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County, et al.

Bristol-Myers Squibb ("BMS") is a pharmaceutical company that manufactures and sells Plavix, a prescription drug that thins blood and prevents clotting.[69] BMS developed, manufactured, labelled, and packaged Plavix, created a market strategy for Plavix, and worked on the regulatory approval of Plavix in New Jersey and New York.[70] Across the country in California, BMS had, at the time of the decision, five research facilities, employed several hundred employees, and took in over $900 million in Plavix pill sales over a six-year timespan.[71] However, BMS

61. Fed. R. Civ. P. 23(b)(1)(B).

62. Fed. R. Civ. P. 23(b)(2).

63. Fed. R. Civ. P. 23(b)(3).

64. Fed. R. Civ. P. 23 (requiring "notice" throughout).

65. *See, e.g.*, AmChem Prod., Inc. v. Windsor, 117 S.Ct. 2231 (1997) (analysis of whether class certification was correct included a look at fairness proceedings, settlement discussions, and final settlement).

66. Castano v. American Tobacco Co., 84 F.3d 734, 744 (5th Cir. 1996).

67. Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

68. Bradt & Rave, *supra* note 25, at 1253.

69. Bristol-Myers Squibb v. Superior Court of California, 137 S.Ct. 1773, 1777-78 (2017).

70. *Id.* at 1778.

71. *Id.*

maintained substantial operations in New York and New Jersey, with over half of its employees working in these two states.[72] The corporation is headquartered in New York and incorporated in Delaware.[73]

Hundreds of plaintiffs sued BMS in California state court for injuries allegedly caused by Plavix.[74] Almost 600 plaintiffs resided in states outside of California, and less than 100 plaintiffs resided in California.[75] The claims were based exclusively on California state law, including products liability, negligent misrepresentation, and misleading advertising laws.[76] The plaintiffs did not allege that California physicians provided the drug, that injuries occurred in California, or that treatment occurred in California.[77] The suit was not brought as a class action, despite hundreds of plaintiffs, because the plaintiffs wanted to avoid the removal of the case to federal court under the Class Action Fairness Act.[78]

BMS asserted a lack of personal jurisdiction regarding the nonresidents, but the California Superior Court denied the motion, finding general jurisdiction because of BMS's "extensive activities in the State" of California.[79] The State Court of Appeals eventually held that general jurisdiction was not present, after the Supreme Court's decision in *Daimler AG v. Bauman*,[80] because BMS is incorporated in Delaware and headquartered in New York.[81] In other words, incorporation did not occur in and headquarters were not located in California. However, the Court of Appeals found that specific jurisdiction over the nonresident claims was present.[82] The California Supreme Court agreed on the presence of specific jurisdiction, using a sliding scale approach,[83] which acknowledged that the "more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim."[84] Put differently, the sliding scale meant that "more extensive contacts with the forum state would offset a weak connection to nonresident plaintiffs' claims."[85] The Supreme Court of the

72. *Id.* at 1777-78.

73. *Id.* at 1777.

74. *Id.*

75. *Id.* at 1778.

76. *Id.*

77. *Id.*

78. Bradt & Rave, *supra* note 25, at 1255.

79. *Bristol-Myers Squibb*, 137 S.Ct. at 1775.

80. 134 S.Ct. 746 (2014) (holding that general jurisdiction over a corporation exists if the corporation's connections are so continuous and systematic as to make the corporation basically at home in that forum state).

81. *Bristol-Myers Squibb*, 137 S.Ct. at 1775.

82. *Id.* at 1778.

83. *Id.*

84. *Id.*

85. Brian A. Troyer, *"District Courts Divide Over Application of 'Bristol-Myers Squibb' Decision*

United States heard this case on the question of whether the exercise of jurisdiction violated the Due Process Clause of the Fourteenth Amendment.[86]

The Supreme Court was concerned with California's sliding scale approach.[87] The Court criticized the sliding scale approach as too relaxed. If the defendant had extensive forum contacts, but such contacts were unrelated to the claims, then the forum's connection to the claims did not matter as much.[88] The Court found that there was an insufficient connection between the forum of California and the claims for these hundreds of plaintiffs.[89] There was not enough to find the necessary connection even though the other plaintiffs received and ingested Plavix in California, BMS conducted research in California, and BMS contracted with a California distributor.[90] The court reasoned that since an "isolated occurrence" of an automobile accident in Oklahoma was not enough for the Court to find personal jurisdiction in *World-Wide Volkswagen*, there was an even weaker connection to California in this case, as no injury occurred there.[91]

The Supreme Court also distinguished the case from its *Keeton v. Hustler Magazine, Inc.* ruling from 1984.[92] In *Keeton*, a New York plaintiff sued a New Hampshire defendant, which distributed its products throughout the country, including in New Hampshire.[93] The Supreme Court noted that specific jurisdiction was present in *Keeton* because of the connection between the distribution of the product in New Hampshire and the alleged damage that occurred there.[94] Alternatively, the plaintiffs in *Bristol-Myers Squibb* did not allege any harm in California, where BMS distributed its product.[95]

Justice Sotomayor, in her *Bristol-Myers Squibb* dissent, voiced the concern that lower courts are expressing today. She emphasized that "the

to Class Actions," THE WLF LEGAL PULSE (Feb. 5, 2018), https://wlflegalpulse.com/2018/02/05/district-courts-divide-over-application-of-bristol-myers-squibb-decision-to-class-actions/ (emphasis added).

86. *Bristol-Myers Squibb*, 137 S.Ct. at 1779.

87. *Id.* at 1781.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 1782; 444 U.S. 286, 295 (1980).

92. *Bristol-Myers Squibb*, 137 S.Ct. at 1782.

93. Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 772-74 (1984)).

94. *Bristol-Myers Squibb*, 137 S.Ct. at 1782 (noting further that *Keeton* regarded "*the scope of a claim* involving in-state injury and injury to residents of the State, not, as in [*Bristol-Myers Squibb*], jurisdiction to entertain claims involving no in-state injury and no injury to residents of the forum State. *Keeton* held that there was jurisdiction in New Hampshire to consider the full measure of the plaintiff's claim, but whether she could actually recover out-of-state damages was a merits question governed by New Hampshire libel law.")

95. *Bristol-Myers Squibb*, 137 S.Ct. at 1782.

majority's rule will make it difficult to aggregate the claims of plaintiffs across the country whose claims may be worth little alone."[96] She noted that bifurcation of claims and "piecemeal litigation" will occur because bringing state claim mass actions against defendants whose main forums are different states will be nearly impossible.[97] Justice Sotomayor found that California courts could exercise specific jurisdiction over the nonresident plaintiffs' claims because BMS purposefully availed itself of the pharmaceutical industry in the state and the plaintiffs' claims related to BMS's instate conduct.[98] She noted that jurisdiction was reasonable because BMS was already facing identical claims from the approximately 100 California plaintiffs.[99] Separate suits in the other plaintiffs' resident states would prove far more cumbersome for BMS.[100] Justice Sotomayor saw the majority's decision as handing corporate defendants one additional advantage,[101] especially if plaintiffs try to bring a mass action against two or more defendants headquartered in different states.[102] Several lower district courts have already started confronting these adverse notions presented by the *Bristol-Myers Squibb* majority and Justice Sotomayor.

d. Lower Court Decisions Since Bristol-Myers Squibb Ruling

In the past few months since the Supreme Court's 8-1 *Bristol-Myers Squibb* ruling, many district courts have wrestled with whether *Bristol-Myers Squibb* affects their previous personal jurisdiction and class action analyses.[103] Unfortunately for class plaintiffs, seemingly more courts than not are finding that *Bristol-Myers Squibb* does have an effect, despite Justice Alito's contention in his majority opinion that the case makes no new law.[104]

Three district court cases, from the Northern District of Illinois, the Northern District of California, and the Eastern District of Missouri, are addressed in the following sections to demonstrate that Justice Alito's

96. *Id.* at 1784.

97. *Id.*

98. *Id.* at 1786.

99. *Id.*

100. *Id.*

101. *Id.* at 1789.

102. *Id.*

103. *See, e.g.*, Everett v. Aurora Pump Co., No. 4:17CV230 HEA, 2018 U.S. Dist. LEXIS 4851 (E.D. Mo. Jan. 11, 2018); Gonzalez-Camacho v. Banco Popular De P.R., No. 17-1448 (DRD), 2018 U.S. Dist. LEXIS 55104 (D.P.R. Mar. 28, 2018); Atlantica Holdings, Inc. v. Sovereign Wealth Fund Samruk-Kazyna JSC, Nos. 12-CV-8852 (JMF), 13-CV-5790 (JMF), 2018 WL 922191 (S.D.N.Y. Feb. 15, 2018); Erwin v. Ford Motor Co., 309 F. Supp. 3d 229 (D. Del. 2018); Oliver v. Ethicon, Inc., No. 2:12-cv-06950, 2017 WL 3193652 (S.D.W. Va. July 27, 2017).

104. *See* Bradt & Rave, *supra* note 25, at 1255-56.

precursory opinion does not reflect reality.

i. *Greene v. Mizuho Bank, Ltd.*

The Northern District of Illinois in *Greene v. Mizuho Bank* noted key implications of *Bristol-Myers Squibb* that affected the court's outcome.[105] In *Greene*, a putative class action[106] was filed by several users of bitcoin who lost funds when the defendant bank caused problems with withdrawals.[107] In light of the *Bristol-Myers Squibb* decision, which came out while *Greene* was being litigated, the defendant bank argued that the court lacked jurisdiction over one of the class members because the complaint did not allege that the defendant had any contacts with Illinois in connection with that plaintiff's claims.[108] While the claims were very similar to the claims of other plaintiffs, who were residents of Illinois, the court determined that under *Bristol-Myers Squibb*, such similarity was not enough to establish jurisdiction over the defendant in connection with that plaintiff.[109]

The plaintiffs in *Greene* additionally argued that the distinction between a putative class action in that case versus a mass action in *Bristol-Myers Squibb* was significant.[110] Mass actions and class actions treat plaintiffs differently.[111] In a mass action, plaintiffs are treated as individuals, with facts needing to be established for each person.[112] Alternatively, in a class action, a class representative stands for the entire class and all of the members are treated as one plaintiff.[113] The Northern District of Illinois, however, rejected this distinction, noting that *Bristol-Myers Squibb* announced "a general principle—that due process requires a 'connection between the forum and the specific claims at issue'"—when establishing jurisdiction.[114] The court specifically noted that "nothing in *Bristol-Myers* [*Squibb*] suggests that it does not apply to named plaintiffs

105. 289 F. Supp. 3d 870, 875-77 (N.D. Ill. 2017).

106. A putative class action is a class action that has not yet been certified by the court. Once a putative class is certified, it simply becomes a class action. *Putative Class Action*, INTERNATIONAL RISK MANAGEMENT INSTITUTE, INC., https://www.irmi.com/term/insurance-definitions/putative-class-action (last visited Mar. 11, 2018).

107. *Greene*, 289 F. Supp. 3d at 872.

108. *Id.* at 874.

109. *Id.*

110. *Id.*

111. *What's the Difference Between a Class Action and a Mass Tort (Mass Action)?*, STARR AUSTEN & MILLER LLP (2018), http://www.starrausten.com/resources/what-is-the-difference-between-a-class-action-and-a-mass-tort-mass-action/.

112. *Id.*

113. *Id.*

114. *Greene*, 289 F. Supp. 3d at 874.

in a putative class action,"[115] even though *Bristol-Myers Squibb* only technically dealt with a mass action.[116]

The plaintiffs further argued that pendent personal jurisdiction enabled specific jurisdiction over one plaintiff's claims. Pendant personal jurisdiction consists of "jurisdiction over a defendant with respect to a claim for which there is no independent basis of personal jurisdiction so long as it arises out of a common nucleus of operative facts with a claim in the same suit over which the court does have personal jurisdiction."[117] The *Greene* court struck down this argument too in light of *Bristol-Myers Squibb*.[118] The court noted that *Bristol-Myers Squibb* now limits pendent personal jurisdiction, though without giving any justification.[119]

Perhaps most remarkably, due to its rarity, the court in *Greene* excused an issue of forfeiture for the defendant in light of *Bristol-Myers Squibb*.[120] A party forfeits a theory, claim, or argument when it fails to argue it at an earlier opportunity.[121] When a party does not make the argument, the opportunity to make the argument subsequently is not allowed, or "forfeited."[122] The *Greene* court noted that the *Bristol-Myers Squibb* decision in the middle of this litigation had a significant enough impact to necessitate such extreme lenity towards the defendant's initial forfeitures of several arguments.[123]

ii. *In re Nexus 6P Products Liability Litigation*

In *In re Nexus 6P Products Liability Litigation*, the Northern District of California granted one defendant's motion to dismiss for lack of personal jurisdiction, although allowing leave to amend.[124] The court held that the plaintiffs fell short of establishing general jurisdiction and specific jurisdiction, in light of *Bristol-Myers Squibb*.[125] In *In re Nexus 6P*, the plaintiffs alleged major defects in Google and Huawei Device USA ("Huawei")'s Nexus 6P smartphones.[126] They claimed that the

115. *Id.*

116. *See* Bristol-Myers Squibb v. Superior Court of California, 137 S.Ct. 1773 (2017).

117. BRENT A. OLSEN, *Personal Jurisdiction – Pendent Jurisdiction*, 20A1 MINN. PRAC., BUSINESS LAW DESKBOOK, ADVANCED TOPICS IN BUSINESS LAW § 16B:140 (Nov. 2017 update).

118. *Greene*, 289 F. Supp. 3d at 875.

119. *Id.*

120. *Id.* at 876-77.

121. *Id.* at 876 ("[T]he forfeiture doctrine applies not only to a litigant's failure to raise a general argument . . . but also to a litigant's failure to advance a specific point in support of a general argument . . . ." (citing Milligan v. Bd. of Trs. of S. Ill. Univ., 686 F.3d 378, 386 (7th Cir. 2012))).

122. *Greene*, 289 F. Supp. 3d at 876.

123. *Id.* at 877.

124. No. 17-cv-02185-BLF, 2018 U.S. Dist. LEXIS 23622, at *3 (N.D. Cal. Feb. 12, 2018).

125. *Id.* at *8, *16.

126. *Id.* at *3.

Northern District of California had general and specific jurisdiction over defendant Huawei, despite the defendant's place of incorporation and principal place of business being in Texas.[127] The plaintiffs argued this because the defendant "ha[d] conducted substantial business in [the Northern California] judicial district and intentionally and purposefully placed the [p]hones into the stream of commerce within this district and throughout the United States."[128]

The court denied finding general jurisdiction over Huawei because the plaintiffs did not show that research activities of Huawei went beyond a "'substantial, continuous, and systematic course of business' to contacts so 'continuous and systematic' as to render Huawei 'essentially at home' in California."[129] Similarly, finding that specific jurisdiction was lacking, the court cited *Bristol-Myers Squibb* in noting that Huawei's collaborative effort with California-based Google did not, by itself, confer specific jurisdiction.[130] Plaintiffs also alleged that Huawei conducted research and had developmental facilities in California, but the court noted that these contacts were irrelevant under *Bristol-Myers Squibb* for purposes of specific jurisdiction if the research and development were unrelated to the Nexus 6P.[131]

iii. *Jordan v. Bayer Corp.*

The Eastern District of Missouri interpreted *Bristol-Myers Squibb* strictly in *Jordan v. Bayer Corporation* in February of 2018.[132] The court dismissed a claim brought by non-Missouri plaintiffs for lack of personal jurisdiction, in light of the *Bristol-Myers Squibb* ruling.[133] The *Jordan* plaintiffs argued that the background section of the *Bristol-Myers Squibb* opinion provided litigants with a "blueprint" for asserting personal jurisdiction over nonresident claims.[134] Specifically, the plaintiffs cited the portion of *Bristol-Myers Squibb* that notes that BMS "did not develop Plavix in California, did not create a marketing strategy for Plavix in California, and did not manufacture, label, package, or work on the regulatory approval of the product in California."[135] The plaintiffs in *Jordan* claimed that they satisfied this supposed "blueprint" by asserting

127. *Id.* at *4.
128. *Id.*
129. *Id.* at *8 (citing Daimler AG v. Bauman, 134 S.Ct. 746, 761 (2014)).
130. *In re Nexus 6P*, 2018 U.S. Dist. LEXIS 23622, at *12.
131. *Id.* at *13-14.
132. No. 4:17-cv-00865-AGF, 2018 U.S. Dist. LEXIS 23244, at *11 (E.D. Mo. Feb. 13, 2018).
133. *Id.*
134. *Id.* at *10.
135. *Id.*

that the defendant used Missouri as "ground zero" for its national campaign and that Missouri was the location for numerous clinical trials regarding the drug at issue in the case.[136]

The *Jordan* court, however, did not find these assertions persuasive. It instead emphasized that *Bristol-Myers Squibb* requires narrower assertions for personal jurisdiction to be determined than the general presence of marketing strategies and clinical trials.[137] That Missouri happened to be the first marketed area for the product throughout the United States was irrelevant to the court.[138] The court took issue with the fact that the plaintiffs did not allege that they themselves actually saw the product being advertised in Missouri or that they themselves actually participated in the clinical trials happening in Missouri.[139] That the non-Missouri plaintiffs did not see marketing in Missouri, were not prescribed the product in Missouri, were not injured by the product in Missouri, and did not purchase the product in Missouri were all notable reasons, grounded in *Bristol-Myers Squibb*, for the court to deny specific personal jurisdiction over the defendant in the state.[140]

III. DISCUSSION

Bristol-Myers Squibb will surely pose barriers to the successful certification of nationwide class actions in years to come, even though its impact will likely not be great enough to serve as a complete death knell[141] for nationwide class actions. Part (a) below dissects the language of *Bristol-Myers Squibb* in light of Justice Sotomayor's dissent and addresses what general implications such language will likely have on class actions going forward. Part (b) analyzes *Jordan* and *Greene* to see how *Bristol-Myers Squibb* is already reshaping present-day class action case law. Finally, Part (c) delves into the four types of class actions articulated in Federal Rule of Civil Procedure 23(b) to consider how *Bristol-Myers Squibb* will impact one type more than the others.

a. The Language of Bristol-Myers Squibb and What it Means for Class Actions Going Forward

The Court's analysis in *Bristol-Myers Squibb* appears flawed in light of personal jurisdiction precedent. The Court cites *International Shoe*,

136. *Id.*
137. *Id.* at *11 (emphasis added).
138. *Id.*
139. *Id.* (emphasis added).
140. *Id.*
141. "Death knell" is used in the colloquial manner in this Comment.

Hanson, and *World-Wide Volkswagen* in its approach to the law.[142] However, it then ignores the ideas of minimum contacts, the traditional notions of fair play and substantial justice along with the attendant *World-Wide Volkswagen* factors, and purposeful availment. Instead, the Court emphasizes that "all the conduct giving rise to the nonresidents' claims occurred elsewhere."[143]

As Justice Sotomayor alludes to in her dissent, this is simply not what specific jurisdiction precedent requires.[144] Settled specific jurisdiction precedent from *International Shoe*, *Hanson*, *World-Wide Volkswagen*, and several other cases clearly does not require that an "'adequate link' exist 'between the State and nonresidents' claims,'" like the *Bristol-Myers Squibb* majority contends.[145] What is required from these previous cases is an analysis of (a) whether the party has minimum contacts with the forum state such that traditional notions of fair play and substantial justice are not violated,[146] (b) whether the party purposefully availed itself of the laws and protections of the forum state,[147] and (c) whether the party could foresee being haled into court there.[148] *International Shoe*, *Hanson*, and *World-Wide Volkswagen* do not use the phrases "adequate link" or "adequate linkage."[149]

The Court may not have gone into a deeper analysis of reasonableness or of fair play and substantial justice because the Court thought the first prong of the *Burger King* two-part test had not been met. However, this is not immediately clear in the *Bristol-Myers Squibb* opinion. Regardless, the Court incorrectly ignored basic precedent and rewrote personal jurisdiction law to necessitate this "adequate link."

Despite this potential break with precedent, lower courts are constrained to follow the Court's newfound concern with "adequate link." Justice Alito highlighted this issue with his phrasing throughout the opinion: "all the conduct giving rise to the nonresidents' claims occurred elsewhere," "nor is it sufficient . . . that [the defendant company] conducted research," and "that *other* plaintiffs were [injured] in California . . . does not allow the State to assert specific jurisdiction over the nonresidents' claims." Courts will now cite this language in finding

142. *Bristol-Myers Squibb*, 137 S.Ct. at 1782.

143. *Id.*

144. *Id.* at 1787 (Sotomayor, J., dissenting).

145. *Id.*

146. International Shoe Co. v. Washington, 326 U.S. 310 (1945); McGee v. International Life Ins. Co., 355 U.S. 220 (1957); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).

147. Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985).

148. *Id.*; Hanson v. Denckla, 357 U.S. 235 (1958).

149. *See* International Shoe Co. v. Washington, 326 U.S. 310 (1945); McGee v. International Life Ins. Co., 355 U.S. 220 (1957); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); Hanson v. Denckla, 357 U.S. 235 (1958).

that there is no jurisdiction. Because *Bristol-Myers Squibb* emphasizes "adequate link," the case can be interpreted as adding a new element to personal jurisdiction tests, at least for the first prong of *Burger King*.

b. The Impact Bristol-Myers Squibb is Already Having on Class Actions

Bristol-Myers Squibb is clearly already affecting the manner in which lower courts treat class actions.[150] Perhaps most significant is the heightened need for class members to now show how they each, individually, have a significant enough connection to the defendant(s) in the suit, shown through concrete, individualized evidence.

Jordan seemingly stands for the proposition that plaintiff assertions need to be narrower and more specific than was required pre-*Bristol-Myers Squibb*. If more courts adopt the notion of *Jordan*, nonresident plaintiffs themselves must have deeper ties related to the defendant(s) within the state of filing. This will notably be more and more difficult to achieve the larger classes are; counsel will be forced to do extensive analyses into each individual, nonresident, class client when attempting to determine if a forum is appropriate. Counsel will have to look more in-depth at how connected each individual nonresident is to the defendant within the state of filing. *Jordan* leads to additional questions that counsel may now have to ask: Was something other than general marketing and clinical trials occurring in the state? Did each, individual plaintiff see the advertising that occurred by the defendant in that state? Did each, individual plaintiff participate in a clinical trial in that state?

Answering these questions may be too arduous for counsel to the point where it becomes infeasible to take on a class action matter. Even if counsel decides to keep a case, the analysis about the best forum, based on which plaintiffs actually have sufficient ties to the defendant in a state, will be more expensive. Counsel will have to spend more time analyzing whether the court will have personal jurisdiction over the defendant in relation to every individual, nonresident plaintiff. Ironically, class actions were designed to avoid such in-depth, time-consuming discoveries.[151] One policy reason for class actions was to reduce the time spent on any one, particular case.[152] The idea is to combine similar enough cases to reduce the need to research each one in great detail.[153]

Even more indicative of *Bristol-Myers Squibb*'s effect on class actions is the *Greene* court's outright rejection of the plaintiffs' argument that

150. *See, e.g.*, *supra* note 103.

151. Roger Bernstein, *Judicial Economy and Class Actions*, 7.2 THE JOURNAL OF LEGAL STUDIES 349, 352-53 (1978).

152. *Id.*

153. *Id.*

Bristol-Myers Squibb does not apply to class actions.[154] Such a holding is a near death knell for class actions in the Northern District of Illinois because that means that class members will, like in *Jordan*, have to plead a connection to the defendant in that given forum for every single, individual plaintiff. Finding that *Bristol-Myers Squibb* applied in *Greene* and that the plaintiffs did not plead enough for jurisdiction to be found will make it extremely difficult for classes going forward in the Northern District of Illinois, for the same reasons indicated above; time and expenses will only increase for class action counsel, when time and expenses are already so high. The burden of upfront time and costs may become so high for plaintiff attorneys that the investment is not worth the possible reward. Plaintiffs may have to bring individual claims instead, which may not be worth doing if each possible payout is negligible.

Moreover, the fact that the *Greene* court excused the defendant's initial forfeiture of its claim that the court lacked personal jurisdiction over the defendant indicates the strength of *Bristol-Myers Squibb*'s effect on personal jurisdiction arguments going forward. Forfeiture happens when a party does not present an argument at the first possible time.[155] Courts only hear forfeited issues under several exceptions, one of which is "changes in the law."[156] Therefore, it is reasonably deducible that the *Greene* court excused the defendant's forfeiture of its lack of personal jurisdiction argument, because it thought that *Bristol-Myers Squibb* sufficiently changed the law of finding personal jurisdiction.

As these cases indicate, *Bristol-Myers Squibb* poses many new barriers to establishing specific jurisdiction over defendants in relation to every single plaintiff in a nationwide class action. Authors of an amicus curie brief submitted to the Supreme Court during the *Bristol-Myers Squibb* litigation go so far as to claim that class actions will now only survive if brought in the defendant's home state, where general jurisdiction will undoubtedly be found.[157]

More remarkably, district court splits are just beginning to form.[158] In *DeBernardis v. NBTY, Inc.*,[159] the Northern District of Illinois ruled that *Bristol-Myers Squibb* does apply to absent class members.[160] The plaintiffs' claims in that case, which were in part tied to nonresident,

154. Greene v. Mizuho Bank, Ltd., 289 F. Supp. 3d 870, 874 (N.D. Ill. 2017).

155. Melissa M. Devine, *When the Courts Save Parties from Themselves: A Practitioner's Guide to the Federal Circuit and the Court of International Trade*, 21 TUL. J. OF INT'L & COMP. LAW 329, 331 (Apr. 2013).

156. *Id.* at 335.

157. Bradt & Rave, *supra* note 25, at 1252.

158. Troyer, *supra* note 85.

159. No. 17 C 6125, 2018 U.S. Dist. LEXIS 7947 (N.D. Ill. Jan. 18, 2018).

160. Troyer, *supra* note 85.

absent plaintiffs, were dismissed.[161] Alternatively, *Fitzhenry-Russell v. Dr. Pepper Snapple Group*[162] did not apply *Bristol-Myers Squibb* to class actions.[163] A commentator noted that in *Fitzhenry-Russell*, "claims of absent class members [were] not before the court for purposes of jurisdiction over the defendant," so the claims of nonresident, absent class members were not dismissed.[164]

The *DeBernardis* court predicted that "based on the Supreme Court's comments about federalism[,] the courts will apply *Bristol-Myers Squibb* to outlaw nationwide class actions in form, such as in this case, where there is no general jurisdiction over the Defendants."[165] Since this is only happening in some courts, not all—as *DeBernardis* predicted—the issue will soon be ripe for the Supreme Court, so that it can revisit the implications of personal jurisdiction on class actions. If the circuit courts affirm their lower court rulings, a circuit split will arise, requiring the Supreme Court to revisit what it sparked with the *Bristol-Myers Squibb* decision.[166] Meanwhile, before such revisiting occurs, *Bristol-Myers Squibb* will continue to influence certain types of class actions more than others.

c. The Implications of Bristol-Myers Squibb on the Different Types of Class Actions

Federal Rule of Civil Procedure 23 establishes four different types of class actions.[167] The fourth type, a Rule 23(b)(3) class action, is one where "questions of law or fact common to class members predominate over any questions affecting only individual members, and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[168] Four factors are used to analyze these predominance and superiority requirements of 23(b)(3) class actions: (A) the class members' interests in individually controlling the prosecution or defense of actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.[169] Rule

161. *Id.*
162. No. 17-cv-00564, 2017 WL 4224723 (N.D. Cal. Sept. 22, 2017).
163. Troyer, *supra* note 85.
164. *Id.*
165. 2018 U.S. Dist. LEXIS 7947, at *6.
166. Troyer, *supra* note 85.
167. Fed. R. Civ. P. 23(b); *supra* Discussion II(b).
168. Fed. R. Civ. P. 23(b)(3).
169. Fed. R. Civ. P. 23(b)(3)(A)-(D).

23(b)(3)(C), "the desirability or undesirability of concentrating the litigation of the claims in the particular forum," implicates personal jurisdiction issues. The other types of class actions—23(b)(1)(A), 23(b)(1)(B), and 23(b)(2) class actions—do not require this particular factor in their analyses.[170] Therefore, 23(b)(3) class actions are the only class type likely to be affected by *Bristol-Myers Squibb*.

Rule 23(b)(3)(C) has been read to embody two key points: a concern for aggregation and a concern for geography.[171] In considering whether a court is geographically appropriate under a 23(b)(3)(C) predominance and superiority analysis, courts look at the convenience of the parties, whether the defendant is located in the forum state, and often whether it is simply possible that the forum is no worse for the class participants than alternative forums.[172] When conducting a 23(b)(3)(C) analysis, courts also consider: (1) the locus of the harm, (2) the concentration of other events forming the basis of the action, and (3) the bulk of the proposed class.[173]

Because these factors are largely related to jurisdictional ties to an area, it is likely that defendants will now highlight 23(b)(3)(C) even more in their fights against predominance and superiority post-*Bristol-Myers Squibb*. Defendants will argue that "the locus of harm" being primarily outside of a given forum will be enough to show "undesirability" of concentrating the claims in that forum. They will point to many plaintiffs being harmed outside of California as enough for the *Bristol-Myers Squibb* court to find a lack of personal jurisdiction.[174] If that is not enough to find personal jurisdiction, defendants will then argue that there is not enough to find a "desirability" of "concentrating the litigation." In all, it is likely that defendants fighting (b)(3) class certifications will point to *Bristol-Myers Squibb* to show that (b)(3)(C) favors their argument of not certifying. *Bristol-Myers Squibb* favors defendants, so (b)(3) classes will likely now be more difficult to certify when defendants raise the notions of that case during certification arguments.

Rule 23(b)(3) class actions are additionally more likely to be affected by *Bristol-Myers Squibb* than (b)(1) or (b)(2) classes because of the extensive "cohesiveness" requirement for (b)(1) and (b)(2) classes. "Cohesiveness" refers to whether the class's claims are "common ones" and that "adjudication of the case will not devolve into consideration of a myriad of issues."[175] The Supreme Court of the United States has never

170. Fed. R. Civ. P. 23(b)(1)-(2).

171. WILLIAM B. RUBENSTEIN, 2 NEWBERG ON CLASS ACTIONS § 4:71 (5th ed. Dec. 2017).

172. *Id.*

173. Anderson Living Trust v. WPX Energy Prod., LLC, 306 F.R.D. 312, 411 (D.N.M. 2015).

174. Bristol-Myers Squibb v. Superior Court of California, 137 S.Ct. 1773 (2017).

175. RUBENSTEIN, *supra* note 171 at § 4:34.

formally acknowledged a "cohesiveness" requirement for (b)(1) and (b)(2) classes.[176] However, innumerable lower courts have recognized "cohesiveness" as necessary in their (b)(1) and (b)(2) analyses.[177] While (b)(3) classes also require cohesiveness,[178] (b)(2) classes usually require more cohesiveness because unnamed members are not afforded the opportunity to opt out.[179]

Because (b)(1) and (b)(2) classes require more cohesiveness, it is likely that (b)(1) and (b)(2) classes will have less jurisdictional problems. Because the classes need to be so cohesive for certification, it is probable that "adequate links" between the forum and the specific claim will exist.[180] Since (b)(1) classes usually deal with limited funds[181] and (b)(2) classes are primarily for injunctive relief,[182] the defendants and nonresident plaintiffs will likely have enough general ties to a forum for courts to find jurisdiction over the nonresidents under *Bristol-Myers Squibb*.

However, because (b)(3) nationwide classes do not require as much cohesiveness and because the class members have the opportunity to opt out, it is likely that finding jurisdiction over all (b)(3) class members may be more of an issue. Because less cohesiveness is required, a court may find that facts adequate for (b)(3) certification are not actually enough to find jurisdiction.

IV. CONCLUSION

Although a case that does not directly deal with class actions, *Bristol-Myers Squibb*'s personal jurisdiction implications will likely have a negative effect on class certification for years to come. Justice Sotomayor correctly emphasized that the language of the decision is concerning for

176. *Id.* at § 4:33.

177. *Id.* at § 4:34. Larsen v. JBC Legal Grp., P.C., 235 F.R.D. 191, 197 (E.D.N.Y. 2006) ("Rule 23(b)(2) certification presumes that the class is cohesive."); Gates v. Rohm and Haas Co., 655 F.3d 255, 269 (3d Cir. 2011) ("Plaintiffs cannot show the cohesiveness required for certification of a Rule 23(b)(2) class."); M.D. ex rel. Stukenberg v. Perry, 675 F.3d 832, 847 (5th Cir. 2012); Avritt v. Reliastar Life Ins. Co., 615 F.3d 1023, 1035 (8th Cir. 2010); Shook v. Bd. of Cty. Comm'rs of Cty. of El Paso, 543 F.3d 597, 604 (10th Cir. 2008) ("Rule 23(b)(2) demands a certain cohesiveness among class members with respect to their injuries, the absence of which can preclude certification."); Catron v. City of St. Petersburg, No. 8:09-cv-923-T-23EAJ, 2010 WL 917609, at *3 (M.D. Fla. Mar. 11, 2010); Blackman v. District of Columbia, 633 F.3d 1088, 1094 (D.C. Cir. 2011) ([U]nder (b)(2), "class claims must be 'sufficiently cohesive to warrant adjudication by representation' . . . cohesiveness is a significant touchstone of a (b)(2) class" (quoting Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623 (1997))).

178. RUBENSTEIN, *supra* note 171 at § 4:34.

179. *Id.* (citing Barnes v. American Tobacco Co., 161 F.3d 127, 143 (3rd Cir. 1998)).

180. Bristol-Myers Squibb v. Superior Court of California, 137 S.Ct. 1773 (2017).

181. TIMOTHY E. EBLE, THE FEDERAL CLASS ACTION PRACTICE MANUAL § 23 (1999).

182. *Id.* at § 24.

plaintiffs going forward. The case is already having a significant enough effect on district court cases, to the detriment of plaintiffs, to actually alter case outcomes. And 23(b)(3) class actions will have even greater difficulty being certified because defendants will highlight the jurisdictional factor of 23(b)(3)(C) in the predominance and superiority discussion even more now. For these reasons, *Bristol-Myers Squibb* will seemingly be a partial death knell for the certification of nationwide class actions in subsequent years, even if it is not a complete barrier.